(3) (3)

No. 00-836 and No. 00-837

IN THE

Supreme Court of the United States

GEORGE W. BUSH,
Petitioner,
v.
PALM BEACH COUNTY CANVASSING BD., *et al.*
Respondents.

NED I. SIEGEL, *et al.*,
Petitioners,
v.
THERESA LEPORE, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit, and the Supreme Court of Florida

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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REASONS FOR DENYING THE WRITS

The petitions for writs of certiorari in *Bush v. Palm Beach County Canvassing Board* and *Siegel v. LePore* should be denied because (1) at the time of their filing and this brief in opposition, neither case is ripe for review; (2) the federal claims asserted in the *Bush* petition were not fairly presented to the Supreme Court of Florida; (3) the federal claims presented in the *Siegel* petition do not merit pre-judgment certiorari; (4) the lack of an adversarially developed factual record counsels against premature judicial action; (5) adequate state remedies exist to address any fairly presented and properly litigated constitutional claims; and (6) the assertion that the "consequences" of these cases "may well include the ascension of a President of questionable legitimacy, or a constitutional crisis" (*Siegel* petition, p. 16), is wrong. Among the hallmarks of our democratic process is patience. The outcome of this presidential election will be known soon, and certiorari review should not be predicated on pessimistic predictions of our citizens' resiliency.

1. Ripeness

The only actual injury that Governor Bush or the Siegel petitioners could suffer would be the certification of Al Gore as the winner of the election in Florida. The winner of the Florida election will be known on Sunday, November 26, 2000 at 5:00 p.m., pursuant to the decision of the Supreme Court of Florida. (We assume that the Florida Secretary of State's office will be open on Sunday and the Monday morning alternative will not be relevant).

Should Governor Bush be certified as the winner of the Florida election, there would be no case or controversy because the injury he complains of – the recount – will not have adversely affected him. As of the time the respective petitions for writs of certiorari were filed on Wednesday evening, November 22, 2000, and when this brief in opposition was filed, on November 24, 2000, the issues presented were not (and are not) ripe for review.

If, on Sunday November 26, 2000, Governor Bush is certified as the winner of the Florida election, the questions presented in the petitions will be moot. We cannot imagine that the unique circumstances bringing us to this juncture would call for utilization of the "capable of repetition yet evading review" exception to the mootness doctrine. This is not a case in which one can say that the questions presented will reoccur, necessitating the exercise of jurisdiction despite the lack of an actual controversy between the named parties. *See Gerstein v. Pugh*, 420 U.S. 103, 110 n. 11 (1975).

If, however, Al Gore is certified as the winner of the Florida election, the Article III, § 2 case or controversy requirements will be present. Nevertheless, even in that case, certiorari should be denied.

2. The Federal Questions Were Not Fairly Presented in the *Bush* Case in the Florida Supreme Court

The *Bush* petition asserts that the federal questions were fairly presented to the Florida Supreme Court. *Bush* Petition, p. 9. The Gore Brief in Opposition notes its doubt about

whether that is so. Gore Brief in Opposition, p. 3, n. 1. We submit for this Court's consideration the colloquy between Mr. Carvin, counsel for Governor Bush, and a Justice of the Supreme Court of Florida relating to the presentation of federal questions:

> Q. . . . . so there's not uniformity even within the state as to the type of voting machine that is used, or the procedures that are used.
>
> A. And we have compl–, we have complained about the *ad hoc* nature of the way in which votes are tallied in differential counties. That is a problem.
>
> Q. But when you say you have complained about it. Where has that been complained about?
>
> A. I'm sorry. In federal court, Your Honor. And I'm not trying to introduce that here. We do –
>
> Q. And why are – Let me ask that question, and I'm st– Is there a constitutional attack on this statute being made?
>
> A. Well, we don't think you need reach the question, but yes.
>
> Q. Is that because you're requesting the federal court to reach it and you don't think that the state court has it within its jurisdiction to

> decide whether a statute is being constitutionally applied?
>
> A. Oh no, clearly state courts have that power. I'm simply making the point that this is a much simpler basis for deciding this case without going all the way to the U.S. Constitution, which is, state law clearly prohibits the relief that Petitioners are requesting because state law makes it quite clear that they have no right to ignore the mandatory statutory deadline imposed upon them by state law. They seek to rewrite the statutes. . . .[1]

That colloquy suggests that the federal constitutional claims were not pressed upon the Supreme Court of Florida and that they were not "fairly presented" within the meaning of that term.

3. The *Siegel* Case Does Not Present Issues Requiring the Extraordinary Exercise of Pre-Judgment Certiorari

Rule 11 of this Court provides that certiorari before judgment is appropriate "upon a showing that the case is of such imperative public importance as to justify deviation from

[1] The colloquy is from the taped recording of the oral argument in the Florida Supreme Court on Monday, November 20, 2000. The Justice posing the questions is Justice Pariente. The argument is available for viewing on Web page wfsu.org/gavel2gavel/schedule.htm.

normal appellate practice and to require immediate determination in this Court."

The *Siegel* petitioners maintain that this is such a case because "[t]he election of our nation's highest office *may* turn on the Court's resolution of the issues presented," and that "this Court's immediate intervention is warranted in order to insure that the rule of law is adhered to in this time of great national concern." *Siegel* Petition, p. 3 (emphasis supplied).

Given the fact that the United States Court of Appeals has expedited the briefing schedule in *Siegel*, and has tentatively set oral argument for November 29, 2000, and that a post-judgment decision of that court (if necessary at all considering that Sunday's certification may moot the case), would be subject to immediate review by this Court prior to the December 12, 2000 date for determining Florida's electors, it would be injudicious to circumvent the established appellate processes by granting pre-judgment certiorari.

Public interest does not equal public crisis. This case does not present, at this time, questions of the same magnitude as those presented in *Dames v. Moore*, 453 U.S. 654 (1981); *United States v. Nixon*, 418 U.S. 683 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Ex Parte Quirin*, 317 U.S. 1 (1942). The availability of the Court of Appeals decision-making process, the availability of post-certification contest procedures in the Florida courts, which would enable a true factual record to be developed, and the presence of constitutional and federal statutory mechanisms for resolving disputes regarding selection of Florida's electors (*see* Art. II, §

1, cl.2, U.S. Const.; and 3 U.S.C. § 5) render the request to grant pre-judgment certiorari improvident.

4. and 5. The Lack of a Factual Record and the Availability of State Remedies

Theresa LePore is the Supervisor of Elections of Palm Beach County, Florida. Charles Burton is a County Court Judge in Palm Beach County, Florida. Carol Roberts is a County Commissioner for Palm Beach County, Florida. Together, they comprise the Palm Beach County Canvassing Board. That Board has labored for nearly two weeks to perform its statutory duty with integrity, grace, and non-partisanship.

Several hundred workers, Democrats and Republicans, have labored several thousand hours to recount the ballots to determine the intent of the voters in Palm Beach County. The work has been tedious, but it has been done carefully and openly. Observers from the respective political parties are present in the counting room. That room is open to all to view through the television cameras that carry the proceedings over the County's television channel. Judge Burton has testified in a judicial proceeding (*Florida Democratic Party v. Palm Beach County Canvassing Board*, Fla. 15th Jud. Circ. Case No. CL-0011078-AB) about the process and the methods used to discharge his and the Canvassing Board's statutory obligations to the voters of Palm Beach County and the State of Florida.

When the Palm Beach County Canvassing Board was in doubt regarding its duties under Florida law, it initiated the

original action in the nature of an interpleader in the Supreme Court of Florida, which led to the decision in that court that is now the subject of the certiorari petition in *Bush v. Palm Beach County Canvassing Board*.

No factual record, tested by the adversarial process, has been developed in this case. The charges and countercharges that permeate the submissions of the political candidates should not be the basis upon which this Court should decide any of the questions presented by either side.

The Supreme Court of Florida, the United States Court of Appeals for the Eleventh Circuit, and the United States District Courts for the Southern and Middle Districts of Florida have all recognized that Florida Statute § 102.168 provides a vehicle for a candidate to, post-certification, initiate an election contest that shall be "immediately" heard. Section 102.168(7), Fla. Stat. Should either candidate wish to bring such an election contest after the Sunday, November 26, 2000 certification of the results of the presidential election, that process will permit the development of a factual record, tested in the crucible of examination and cross-examination, which would be consistent with the principle that the adversarial process is the best guarantor of reliable judicial decision-making.

6. There is No Constitutional Crisis

The utilization of Florida's post-election statutory processes, the Herculean efforts of citizens and the Palm Beach County Canvassing Board to accurately count the vote, the immediate responsiveness of the Florida and federal courts to

numerous lawsuits, the extraordinary work of legions of lawyers over the past two weeks, and the diligent reporting of all of these events by the press, prove that every organ of the body politic is alive, well, and working.

At the heart of the *Bush* and *Siegel* petitions for writs of certiorari is the notion that unless this Court acts now, the legitimacy of the presidency of the United States will be compromised. The Palm Beach County Canvassing Board and its members, Theresa LePore, Charles Burton and Carol Roberts, take a more optimistic view. The breathing room that our Constitution and laws give to the honest and unselfish efforts of our country's citizens and elected officials will be respected by the nation. The president who is elected *via* that process – be it George W. Bush or Al Gore – will be the President of all the people. A familiar homily is "every vote counts." Counting those votes does not create a crisis warranting certiorari review.

CONCLUSION

For the foregoing reasons, the Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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